SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1973

No. 73-930

MARITIME COMMUNICATIONS SERVICE,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITIONER'S REPLY MEMORANDUM

RONALD E. MATTESON,
LOREN R. MCQUEEN,
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SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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The Opposition of Pacific Telephone Company, Pacific, is generally not responsive to the major issue at hand and their preliminary statement is mostly inaccurate. Pacific's Opposition contains excessive material relating to the fact that petitioner should have initially filed its petition for review in the District of Columbia Circuit. Petitioner has already conceded that it inadvertently filed in the wrong court. The Opposi-

tion excessively delves upon the fact that certain Federal Courts, when lacking subject matter jurisdiction, have dismissed the case. This situation does not exist since the Ninth Circuit, realizing that it lacked subject matter jurisdiction, transferred the case rather than to dismiss it. The Court was aware of the fact that a statute of limitation would prevent any further action by petitioner and dismissal would terminate petitioner's rights.

Pacific attempted to rephrase the question presented but failed to correctly do so. The major question involves preservation of a cause by transfer of the case due to the fact that a statute of limitation will prevent any further filing, therefore, certain legal rights will be lost. A majority of states favor preservation of a cause by transfer while the Federal Courts generally follow the harsh approach of dismissal. This most important issue, considering transfer by a court which lacks subject matter jurisdiction, has not been decided by this Court, (8 L. Ed. 2d 858, §7).

Pacific believes that Petitioner's statement of the case is inaccurate and that much of it irrelevant. Pacific has failed to point out the inaccurate and irrelevant statements.

Pacific erroneously claims that petitioner has not cited any decision relating to a Federal Court's use of state law in reference to 28 U.S.C. §1652. Apparently Pacific failed to refer to (*Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 411, footnote 8). Pacific concludes that if 28 U.S.C. § 1652 does apply then Federal

Courts will follow substantive law of the state. Nevertheless, it is possible for a Federal Court to consider California Code of Civil Procedure §396 as being substantive since the outcome in a Federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court, (*Guaranty Trust Co. v. York*, 326 U.S. 109).

(*Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362) held that a Court of Appeal can transfer a case and petitioner relies on the case for that fact—whether the transfer is to prevent the termination of legal rights or whether the transfer is for enforcement of valid orders.

(*Timken Roller Bearing Co. v. Penna. R. R. Co.*, 274 U.S. 186, 187; see Pacific Opposition p. 6) follows present United States Legislative intent in that the basic foundation of the Transfer Act is directed toward the merits of a case and not toward jurisdiction, therefore, transfer and not dismissal is the proper procedure. The Transfer Act might also apply as between different appellate courts by arguing the philosophy applied to 28 U.S.C. §1404(a), (*Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362), whereby it was inferred that §1404(a) also applied to a Court of Appeal.

A majority of states favor preservation of an action that is filed in a Court which lacks subject matter jurisdiction while the Federal Courts generally favor the harshness of dismissal. This Court could now de-

cide which position should be applied in this proceeding when also considering the interest of justice.

Dated: February 12, 1974.

Respectfully submitted,

RONALD E. MATTESON,

LOREN R. MCQUEEN,